

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DANTE GORDON * 4:19-CV-00585
*
V. * 2:22 P.M. to 2:56 P.M.
*
SIG SAUER, INC. * AUGUST 21, 2019

HEARING ON MOTIONS
BEFORE THE HONORABLE CHIEF JUSTICE LEE H. ROSENTHAL
Volume 1 of 1 Volume

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1 **PROCEEDINGS**

2 THE COURT: All right. Dante Gordon v. SIG
3 Sauer. Come on up and state your appearances.

4 MR. MARCHESE: Good afternoon, Your Honor.
5 Joseph Marchese of Bursor & Fisher for the plaintiff.

02:22:52

6 MR. ALLEN: Brandon Allen with Reynolds Frizzell,
7 co-counsel for the plaintiff.

8 MR. DWERLKOTTE: Good afternoon, Your Honor.
9 Brent Dwerlkotte for defendant SIG Sauer.

02:23:10

10 THE COURT: Thank you very much.

11 MR. JOYCE: Good afternoon, Your Honor. Rob
12 Joyce with Littleton Park for defendant SIG Sauer.

13 THE COURT: Thank you. All right. So we have
14 some very interesting issues. Most of the issues deal
15 with whether a claim has been stated but, more
16 importantly, whether certification of the classes that are
17 proposed is permissible. A very interesting case.

02:23:44

18 Have there been any other cases, based on this alleged
19 defect, that have been filed?

02:24:03

20 MR. JOYCE: No, Your Honor. As indicated in the
21 papers, there is a class action pending in Missouri
22 alleging a different unrelated alleged defect.

23 THE COURT: With the same model?

24 MR. JOYCE: The same model, right. But that
25 hasn't -- that's just at the allegation stage. That's

02:24:23

1 also subject to a pending dispositive motion.

2 THE COURT: Okay. Very good. Okay. I did want
3 to ask questions of counsel for the plaintiff focusing on
4 the allegations that Mr. Gordon understood from reviewing
02:24:55 5 unspecified materials that there had been certain
6 representations made.

7 He doesn't ever, as best I can tell, tie together or
8 connect what he reviewed to the "Safety Without
9 Compromise" marketing campaign that he references.

02:25:25 10 Doesn't allege when it started. Doesn't allege what it
11 was that he looked at. Doesn't allege when he looked at
12 it. Doesn't allege the specific statements made. He just
13 says I looked at stuff and here is what I understood.

14 How can that be enough and why isn't there more?

02:25:43 15 MR. MARCHESE: Thank you, Your Honor. Actually,
16 in Paragraph 8 of the first-amended complaint we do allege
17 the specific representations, which is that the gun was
18 quote-unquote drop safe.

19 THE COURT: But where was that representation?

02:26:01 20 MR. MARCHESE: It was in the marketing materials.

21 THE COURT: What marketing materials?

22 MR. MARCHESE: I believe, standing here today,
23 that it was on the website.

24 THE COURT: Okay. That's not alleged. You need
02:26:13 25 to allege the when, the what, the how. This is a 9(b)

1 heightened disclosure requirement. You don't allege that.

2 MR. MARCHESE: With respect to warranty claims, I
3 mean, the plaintiff is bringing a variety of warranty
4 claims, Your Honor.

02:26:31

5 THE COURT: Yes.

6 MR. MARCHESE: Also bringing a claim for unjust
7 enrichment.

8 THE COURT: And fraud.

02:26:39

9 MR. MARCHESE: Some fraud and then the Texas
10 Deceptive Practices -- Trade Practices Act and the
11 warrantied claims, Your Honor, are not a 9(b) pleading
12 standard. That's a Rule 8 pleading standard. And so I,
13 you know, respectfully disagree that with respect to those
14 claims we have to meet the heightened standard.

02:26:59

15 THE COURT: But on the claims that do require a
16 heightened pleading standard, that do have that apply, can
17 you amend to make clearer precisely what he looked at and
18 precisely what statements were on what he looked at when
19 he looked at them in relationship to when he purchased the
20 weapon?

02:27:20

21 MR. MARCHESE: I believe we can do that, Your
22 Honor.

23 THE COURT: But you haven't yet?

02:27:28

24 MR. MARCHESE: Well, I had -- I had thought that
25 our allegations were sufficient because in Paragraph 8 of

1 the complaint, although he doesn't allege a specific time,
2 the plaintiff does state that he remembers reviewing the
3 drop-safe claims prior to making his purchase and that he
4 relied on those claims in making his purchase and he also
5 states that he would not have purchased the gun had he
6 known that those -- that those claims were not true. So
7 that's all in there.

8 THE COURT: And if I found it insufficient, you
9 think that --

10 MR. MARCHESE: Well, I would ask -- I would ask
11 for leave to amend if Your Honor had thought that that was
12 insufficient.

13 THE COURT: Okay. In what years did SIG Sauer
14 make the safety -- begin the "Safety Without Compromise"
15 campaign? Does anybody know?

16 MR. JOYCE: Well, Your Honor, the assertion that
17 the plaintiff relied on a statement on the --

18 THE COURT: Drop safety.

19 MR. JOYCE: -- on the website that the firearm
20 won't discharge unless you pull the trigger, I think is
21 what he is referring to, and then ignored the actual
22 product manual that goes with the pistol that specifically
23 has a warning with a picture that says, Do not drop your
24 firearm, any firearm can discharge if dropped. All right.

25 So I think that assertion is just not plausible. It's

1 not -- it doesn't withstand -- you know, it doesn't
2 withstand the particularity requirement with respect to
3 the --

4 THE COURT: Well, it's particular.

02:29:13

5 MR. JOYCE: Well, it's not plausible.

6 THE COURT: It's not what?

7 MR. JOYCE: It's not plausible. It has got to be
8 particular but it also has to be --

02:29:21

9 THE COURT: Would it be plausible if the manual
10 statement wasn't there?

11 MR. JOYCE: I think that's a better -- that's a
12 closer -- that's a closer call and maybe --

13 THE COURT: When was the manual provided? Before
14 or after the weapon was purchased?

02:29:32

15 MR. JOYCE: It's provided with the purchase of
16 every firearm. Every firearm there is a warning manual --

17 THE COURT: At the time of the purchase.

18 MR. JOYCE: -- or instruction manual at the time
19 of purchase, right.

02:29:41

20 THE COURT: All right.

21 MR. JOYCE: And the warning manual is also on the
22 internet. It's available that way, also. But it's
23 physically provided.

02:29:49

24 THE COURT: So it's on the same website that the
25 statements would have been included?

1 MR. JOYCE: Yes. Yes.

2 THE COURT: All right. Let me switch to a
3 slightly different aspect of the question. Did all of
4 this, the "Safety Without Compromise" marketing campaign
5 that -- was it largely a website campaign?

02:30:06

6 MR. JOYCE: There may have been -- I can't say
7 that there wouldn't be any point of sale, you know,
8 brochure or any information like that. It's also
9 undetermined at this point whether that information was
10 even on the website in 2014.

02:30:22

11 THE COURT: Well, that's my question. Do you
12 know when it went on the website? Does anybody?

13 MR. JOYCE: We don't know that information.

14 MR. MARCHESE: I would need discovery on that,
15 Your Honor. They would know better than I.

02:30:32

16 THE COURT: So your client says it was on the
17 website at the time he made his purchase in 2014?

18 MR. MARCHESE: That's what he told me that he
19 recalls.

02:30:38

20 THE COURT: Which was the first year that the
21 weapon was marketed?

22 MR. JOYCE: Right. That's not in the pleading
23 though, Your Honor. The pleading doesn't say the
24 plaintiff reviewed the website and he made -- he noticed
25 that on the website and he made his --

02:30:48

1 THE COURT: No. It says the website and a bunch
2 of materials. Sort of a --

02:30:58

3 MR. MARCHESE: But it says he reviewed that claim
4 and remembers it prior to making his purchase. That is
5 what is important.

6 THE COURT: Well, it says he looked at marketing
7 materials and documents accompanying the P320 before
8 making his purchase that would have included the manual.

02:31:12

9 MR. MARCHESE: Well, I don't know. First of all,
10 every gun, Your Honor, could -- could misfire when
11 dropped. The issue is that this gun has a design that
12 is --

13 THE COURT: Had a tendency.

14 MR. MARCHESE: -- has a design defect --

02:31:25

15 THE COURT: I understand.

16 MR. MARCHESE: -- that is unduly prone.

17 THE COURT: It was more likely to than other
18 weapons. Is that a fair statement?

02:31:33

19 MR. JOYCE: Well, Your Honor. This firearm met
20 every U.S. safety standard.

21 THE COURT: No. No. That's not the issue.
22 Their theory of liability is that it was more likely to
23 fire when dropped than other weapons. Any weapon can but
24 this one was more likely; is that right?

02:31:47

25 MR. MARCHESE: Yes. And you don't have to take

1 our word for that. The Army said that, too.

2 MR. JOYCE: Well, Your Honor, it had a
3 vulnerability at a particular angle that was not tested
4 for under that existing U.S. safety standards.

02:31:58

5 THE COURT: We're getting outside the pleadings
6 here.

7 MR. JOYCE: Well, that actually is in the
8 pleading.

9 THE COURT: Which part?

02:32:04

10 MR. DWERLKOTTE: Paragraph 48 and 49.

11 THE COURT: That their internal testing revealed
12 the --

13 MR. JOYCE: 48 and 49.

14 THE COURT: All right.

02:32:09

15 MR. JOYCE: And then the elephant in the room, of
16 course, here, Your Honor, is that there was a safety
17 upgrade made available to this plaintiff and every other
18 purchaser --

19 THE COURT: Well, I know. The voluntary upgrade
20 program.

02:32:19

21 MR. JOYCE: -- that addresses that.

22 THE COURT: All right. So before we get to that,
23 let me ask one other question about the pre or at purchase
24 representations. To the extent reliance is required for
25 the claims that rest on these promises that you have

02:32:36

1 identified or representations and warranties that you have
2 identified, can you address the concerns raised about
3 whether when individual reliance is an issue,
4 certification of a (b)3 class can be proper?

02:33:02

5 MR. MARCHESE: I can address that, Your Honor;
6 but really, it's hard for me to address that right now
7 without discovery because I need to know in discovery how
8 pervasive these drop performance claims were on the
9 marketing material.

02:33:20

10 THE COURT: That doesn't go to the question of
11 reliance on the statements made at the time of the
12 purchase. That's the issue.

02:33:39

13 MR. MARCHESE: So, you know, once we get down the
14 line, Your Honor, we are going to make a class
15 certification motion and there is going to be an
16 opposition and so on and so forth. Right now we have a
17 nationwide claim and we have got warranty claims and some
18 states do have reliance.

02:33:53

19 THE COURT: What about the common law fraud and
20 Texas Deceptive Trade Practices Act claims that are based
21 on false and misleading statements? They require
22 individual reliance.

23 MR. MARCHESE: I believe that --

24 THE COURT: Fraud does.

02:34:11

25 MR. MARCHESE: I believe that the drop

1 performance claims were, basically, so material and so
2 pervasive that some level of reliance could be presumed;
3 but again, I would need discovery on this at the nascent
4 stage of this litigation.

02:34:29

5 THE COURT: What is a case that says that
6 discovery can be presumed because some -- that reliance
7 can be presumed because something happens relatively
8 frequently? There is a presumption of -- there is a
9 presumption that can be applied in some securities cases
10 of reliance, based on the market; but I'm not aware of it
11 in this kind of case. Cite me a case that does that.

02:34:50

12 MR. MARCHESE: Sure. *Ebin v. Kangadis*.

13 THE COURT: Sorry?

02:35:03

14 MR. MARCHESE: *Ebin v. Kangadis*. It's a consumer
15 class action.

16 THE COURT: Okay. We'll take a look.

17 MR. MARCHESE: And also *Hart v.* -- I can't
18 remember the name of the defendant but it is, basically,
19 another consumer class action case in the Southern

02:35:12

20 District of New York. Judge --

21 THE COURT: No. No. No. Texas. Start with the
22 Fifth Circuit.

23 MR. MARCHESE: Okay.

24 THE COURT: What do you do with the Fifth

02:35:18

25 Circuit? Not Second Circuit.

1 MR. MARCHESE: So I would give --

2 THE COURT: Are you aware of any Fifth Circuit
3 case?

02:35:27

4 MR. MARCHESE: Not standing here at the moment,
5 Your Honor.

6 THE COURT: All right. Are you aware of a
7 case -- what is your best case that says if individual
8 reliance is an element of the claim, certification of a
9 class is improper for fraud claims, DTPA claims?

02:35:41

10 MR. DWERLKOTTE: Absolutely, Your Honor. What we
11 did in our brief is I think we spelled out in all the
12 jurisdictions whether reliance is required for
13 warranty-type claims. We did that for every single state.
14 So I don't think that any amount of discovery is going to
15 change that.

02:35:55

16 You have got Texas is one of the states -- it's
17 Exhibit 1 or Exhibit A -- that talks about reliance and
18 that it's required. That's *Omni USA v. Parker*, 964
19 F. Supp. 2d 805. We have also outlined unjust enrichment
20 elements in each state as well as fraudulent concealment
21 in each state, Your Honor. I think that that --

02:36:14

22 THE COURT: That raises two questions.

23 MR. DWERLKOTTE: Sure.

24 THE COURT: One is variations among the various
25 states, and the second is individual reliance as an

02:36:25

1 element of a claim that may be so frequent that it raises
2 a concern unrelated to variability.

3 MR. DWERLKOTTE: Are we talking about the
4 presumption? Is that what you are --

02:36:47

5 THE COURT: Yes.

02:37:00

6 MR. DWERLKOTTE: So I think the only -- the only
7 state that follows a presumption would be California, that
8 there is a presumption that if a particular statement is
9 in fact false in its material to a certain amount of
10 consumers that certain courts in California have allowed
11 what they would call -- I would call it more of a -- not a
12 presumption but a -- I just blanked on the word.
13 Essentially a presumption, Your Honor, but only in
14 California, not in Texas.

02:37:18

15 THE COURT: And what is your best Texas case that
16 says that if reliance is an issue that class treatment is
17 inappropriate?

18 MR. DWERLKOTTE: I would cite the *Cole* case, the
19 *Rosa* case, as well as *Castano*, Your Honor.

02:37:34

20 THE COURT: Do you want to -- and the *Cole* case
21 raises one other issue, and that is the standing issue
22 that you have challenged. But it seems to go against you
23 on the standing issue. How is it -- do you distinguish it
24 on that basis?

02:37:55

25 MR. DWERLKOTTE: I do, Your Honor. I think in

1 Cole I think that the product had actually manifested the
2 defect that the plaintiff claimed in that case. Whereas
3 in this case our position is that Mr. Gordon's pistol has
4 not manifested the defect, i.e. the drop fire.

02:38:18 5 And I think, just to add on to that, Your Honor, I
6 think the *Inman* case -- it's a Texas Supreme Court case --
7 lays out kind of the distinction between *Cole* and the
8 situation that we're talking about here where in *Cole* the
9 event actually happened but the defect was present either
02:38:36 10 at the time of sale or it actually occurred.

11 Whereas here in the cases that we have cited, like
12 *Everett*, those cases are clear that if an event has to
13 occur and it could occur in the future, i.e. the drop
14 event here, that those -- those type of allegations are
02:38:51 15 insufficient for standing, Your Honor.

16 THE COURT: Did you want to respond?

17 MR. MARCHESE: Well, I would just say that right
18 now we are at the pleading stage, and I would certainly
19 love the opportunity to brief all of these issues at the
02:39:02 20 class certification stage with respect to -- and provide
21 the Court with a survey of different state laws and all of
22 the elements and, you know, there are courts that certify
23 fraud cases on a multi-state basis all the time.

24 THE COURT: Well, SIG Sauer has already done an
02:39:22 25 analysis laying out variations among the various state

1 laws. Is there any reason that precludes you from doing
2 that as well?

02:39:41

3 MR. MARCHESE: There is nothing that precludes me
4 from doing it. I'm not sure we have done that yet. But
5 generally speaking, that's something that we would handle
6 at the class certification stage after getting some
7 discovery that might bear on some of these issues. With
8 respect to whether there is --

02:39:55

9 THE COURT: Why would discovery bear on the
10 variability of state law? That's something that doesn't,
11 it seems to me, depend on discovery into factual grounds.

12 MR. MARCHESE: That is a legal issue, Your Honor.

13 THE COURT: That's right.

02:40:10

14 MR. MARCHESE: But I think to some extent there
15 is a mixed question of law and fact, depending on what we
16 would find out about these drop performance claims in
17 connection with the safety marketing campaign that SIG
18 did.

02:40:29

19 With respect to whether a defect has manifested
20 itself, we would say that this is a design defect case.
21 And so there is an inherent defect in each unit of that
22 pistol as it was originally designed.

02:40:56

23 And we have also made allegations about how there are
24 a number of users of the P320 who were injured and shot
25 because they dropped their weapon and they were subject to

1 a drop-fire incident.

02:41:18

2 So this is not a situation like in the *Everett* case
3 which related to a manufacturing defect with some
4 seatbelts that never, you know, malfunctioned. This is a
5 case where there is a present defect in every one of the
6 units of the P320 coming off of the factory line, and
7 that's exactly what the court in Missouri in the *Hartley*
8 case said. They said that an allegation of a design
9 defect is not a potential problem. It is something that
10 is manifest in the product.

02:41:44

11 MR. JOYCE: Well, Your Honor, Mr. Hartley's gun
12 actually allegedly fired out-of-battery. We don't agree
13 with his assertion, but that allegation was made.

02:42:04

14 Secondly, in *Hartley*, the plaintiffs contend that the
15 upgrade program, which in fact was never intended to
16 address an alleged out-of-battery problem, which we don't
17 even think exists, but that is in that case. The
18 plaintiffs allege --

19 THE COURT: Wait a minute. Okay.

02:42:17

20 MR. JOYCE: -- that there is no fix available for
21 the out-of-battery problem that they allege.

02:42:35

22 In contrast, in this case, plaintiffs concede that the
23 voluntary upgrade program that is available free of charge
24 to the plaintiff and everyone else that has a 320 does
25 address the concern.

1 THE COURT: Before we get to that, what is your
2 best case or cases that when there are -- that the
3 analysis of state law and whether subclassing will
4 overcome any problems with variability or variations
5 across the states or not, what is your best case that says
6 that that is appropriately handled at the motion to
7 dismiss side -- stage as opposed to waiting for discovery
8 or certification motions?

9 MR. DWERLKOTTE: Sure, Your Honor. That would be
10 the *Rosa* case again. That was a motion to dismiss. That
11 was at the motion to dismiss stage. I think that's right
12 on track here, Your Honor.

13 THE COURT: All right. And what is your best
14 case for saying you should wait until the class
15 certification stage?

16 MR. MARCHESE: We have a Fifth Circuit -- we
17 cited a lot of authority on this. We cited a Fifth
18 Circuit case.

19 THE COURT: Which is what?

20 MR. MARCHESE: Give me a minute, Your Honor. I'm
21 sorry.

22 (Sotto voce discussion between counsel.)

23 MR. MARCHESE: So it's, right, *Cole v. General*
24 *Motors Corp.*, 484 F.3d 717, Fifth Circuit.

25 THE COURT: Okay. I have that. All right.

1 Thank you.

2 MR. DWERLKOTTE: Your Honor, could I address that
3 one real fast?

4 THE COURT: I'm sorry?

02:44:16

5 MR. DWERLKOTTE: If I could address that one real
6 fast.

7 THE COURT: Go ahead.

02:44:25

8 MR. DWERLKOTTE: I was going to address that one.
9 In that case, Your Honor, we would differentiate that one
10 because it wasn't raised at the motion to dismiss stage.
11 It was, in fact, at the class certification where that was
12 challenged. And the Court there denied class
13 certification on a nationwide basis. We think that
14 actually goes in our favor.

02:44:41

15 THE COURT: All right. The last set of questions
16 that I have is the impact of the voluntary upgrade
17 program, the argument over whether that undermines, that
18 the availability of that fix wholly undermines the ability
19 of the plaintiff to claim any kind of design defect.

02:45:16

20 Hotly disputed. What is your best case for your argument?
21 And then, I'll hear from the plaintiff.

22 MR. DWERLKOTTE: What is our best case on
23 standing, Your Honor?

02:45:27

24 THE COURT: Well, on the question of whether --
25 yes, on the question of whether the recall fixes

1 everything, undermines the claim. I think you rely on
2 Cole. Any other cases?

3 MR. DWERLKOTTE: We cite *Everett*. We think
4 *Everett* and those line of cases are on all fours here. I
02:45:46 5 think it's slightly nuanced here, Your Honor, in that I
6 think some courts have -- have looked at and allowed a
7 plaintiff to proceed on an injury theory that they have
8 stopped using a product for fear that a defect may
9 manifest.

02:46:02 10 Here this case falls in one of those small niches
11 where --

12 THE COURT: Well, that's what he does allege.

13 MR. DWERLKOTTE: I'm sorry?

14 THE COURT: That's what he does allege.

02:46:11 15 MR. DWERLKOTTE: That he -- after the first
16 complaint, he comes back later and says, yes, I have
17 stopped using it.

18 THE COURT: Right.

19 MR. DWERLKOTTE: That is what some courts have
02:46:18 20 found that to be the case. For example, there is a BPA
21 decision. I know it's Eighth Circuit, Your Honor, but I
22 think Judge Smith there does a really nice job of laying
23 out this analysis, which includes Fifth Circuit law. What
24 he says there is it would be ridiculous and absurd to say
02:46:34 25 that we don't -- you would have to -- we wouldn't find

1 standing if you haven't actually ingested poison, for
2 example. That would be absurd.

02:46:48

3 But in a situation where you have a recall or
4 especially one where -- sorry -- not a recall but an
5 upgrade, one that is conceded to be appropriate and would
6 make him whole, that that is really the linchpin here for
7 why he doesn't have standing.

02:47:08

8 MR. JOYCE: Right. And the cases where there was
9 an assertion that the Court found valid, at least on the
10 motion to dismiss claim, that the plaintiff decided to
11 stop using the product out of fear that an alleged defect
12 made the product unsafe, in those situations there wasn't
13 an available fix, what the plaintiffs call a fix.

02:47:28

14 And that's key here because the plaintiff here can
15 return his gun to SIG. And just like under any garden
16 variety warranty claim in any product for any product
17 manufacturer, he can get his gun back in a week and a half
18 and his -- he can use the product and the product is now
19 above and beyond any, you know, drop safety requirements
20 and any abusive handling standards in the United States.
21 And the plaintiff doesn't allege to the contrary.

02:47:54

02:48:10

22 If every standard variety warranty claim becomes the
23 basis of a class action, Your Honor, where the plaintiffs'
24 lawyers sweep in after the fact and take a fee for
25 something that has already occurred, the courts are going

1 to be overrun.

2 MR. DWERLKOTTE: Your Honor, I think one of the
3 cases that plaintiff cites actually illustrates this point
4 very nicely. It's the *BMW* case on Pages 8 or 9, I
02:48:24 5 believe. It's *Bang v. BMW*. In that case the plaintiff
6 alleged a defect. And then there was a -- BMW offered a
7 repair but the plaintiffs claimed that that repair didn't
8 fix everything or that it was inadequate. And that's
9 exactly what we're talking about.

02:48:41 10 THE COURT: All right. Anything else on these
11 points?

12 MR. MARCHESE: Yes, Your Honor. So, first of
13 all, the voluntary upgrade program, so-called, as it is,
14 takes four to six weeks to complete and sometimes more
02:48:56 15 time than that.

16 MR. JOYCE: That's not true.

17 MR. MARCHESE: And during that time, SIG installs
18 a lighter trigger to address this drop-safety issue. But
19 SIG never provided effective notice of that program to its
02:49:11 20 customers and it misrepresented --

21 THE COURT: But your client doesn't deny that he
22 knew about it.

23 MR. MARCHESE: Excuse me?

24 THE COURT: Does your client deny that he knew
02:49:18 25 about it?

1 MR. MARCHESE: He does not deny that he knew
2 about it.

3 THE COURT: In fact, he says he didn't want to
4 because he didn't want to be without the use of it.

02:49:26

5 That's one harm he alleges. He doesn't explain why he
6 didn't want to avail himself of the opportunity.

02:49:48

7 MR. MARCHESE: He learned about the defect with
8 this gun in December of 2018, Your Honor. He learned
9 about it from a man in his church congregation. And he
10 was outraged about the fact that there was this issue with
11 a -- a gun safety issue and he cares a lot about gun
12 safety and SIG had not -- SIG had an opportunity to reach
13 out to people who registered their guns with them. SIG
14 had an opportunity to reach out to people who submitted
15 warranty cards to them. But SIG has not done any direct
16 notice of the voluntary upgrade program.

02:50:14

17 And then, they misrepresented the nature of the
18 program, sometimes expressly stating that the guns were
19 safe as originally designed and that the upgrade has
20 nothing to do with drop safety. And as a result, there
21 are hundreds of thousands --

02:50:27

22 MR. JOYCE: That is just not correct.

23 MR. MARCHESE: Excuse me. And as a result, there
24 are hundreds of thousands of these defective P320s still
25 out on the streets.

02:50:39

1 Now here, the plaintiff alleged economic injury that
2 confers standing. He paid for a gun that was represented
3 as drop safe, but he got a gun with a drop-fire defect.
4 And that's quintessential economic harm suffered at the
5 point of purchase.

02:50:54

6 The plaintiff and the punitive class members can
7 pursue money damages because they received less than what
8 they bargained for at the time of purchase, and plaintiff
9 has alleged that he has been deprived of the use and
10 enjoyment of his gun, which he stopped using due to safety
11 concerns.

02:51:08

12 And he is fully within his rights to bring these -- to
13 bring these claims, Your Honor. And the voluntary upgrade
14 program cannot moot his claims because his claims include
15 remedies such as punitive damages or trebling of damages
16 that are simply not addressed by the voluntary upgrade
17 program.

02:51:26

18 And he also wants injunctive relief to get SIG to set
19 the record straight on what is really going on here, and
20 the voluntary upgrade program just does not do that.

02:51:45

21 So -- so I don't think the defendant can moot out the
22 plaintiff's claim with that upgrade program. It's just
23 too little too late. And so that would be my response.

24 THE COURT: Anything from the --

25 MR. DWERLKOTTE: May I address a couple of those?

02:52:03

1 MR. MARCHESE: I'm sorry. One other point. They
2 brought these arguments up in the *Hartley* case. That's
3 the other punitive class action about another type of
4 design defect with the P320, and the judge said this issue
5 with the voluntary upgrade program is rife with factual
6 issues that are inappropriate to decide on a motion to
7 dismiss at the pleading stage and that's where we are,
8 Your Honor.

9 MR. JOYCE: Well, Your Honor, let me address
10 that.

11 THE COURT: Is that a summary judgment motion?

12 MR. JOYCE: Your Honor --

13 MR. DWERLKOTTE: A motion to dismiss.

14 MR. MARCHESE: A motion to dismiss.

15 MR. JOYCE: Your Honor, *Hartley* has nothing to
16 with the voluntary upgrade. The voluntary upgrade had
17 nothing to do with --

18 THE COURT: Was there a voluntary upgrade in
19 *Hartley*?

20 MR. JOYCE: Not that relates to the defect that
21 they are alleging in *Hartley*. That has nothing to do with
22 it, no.

23 THE COURT: Wait. Wait. I'm confused. What was
24 the voluntary recall related to in that case?

25 MR. JOYCE: It wasn't. The voluntary -- in

1 *Hartley* they are alleging that the P320 can fire
2 out-of-battery, and SIG denies that that's the case.
3 That's what the class action is there.

4 THE COURT: Was there a voluntary --

02:53:03

5 MR. JOYCE: SIG instituted a voluntary upgrade to
6 deal with the drop-fire issue not to --

7 THE COURT: Did they -- okay. Was there a
8 voluntary upgrade for the issue that was brought up in
9 *Hartley*?

02:53:15

10 MR. JOYCE: No.

11 THE COURT: Okay.

12 MR. DWERLKOTTE: No.

13 MR. JOYCE: It's the same gun. So the same guns
14 or the same firearms are the subject of that.

02:53:19

15 MR. MARCHESE: I disagree.

16 THE COURT: I'll look at the case.

17 MR. MARCHESE: I disagree. There is a mechanical
18 disconnecter added to the weapon which addresses this --

19 THE COURT: Both?

02:53:28

20 MR. MARCHESE: -- which addresses this potential
21 out-of-battery design defect.

22 THE COURT: As well as the drop fire?

23 MR. JOYCE: That is not why the mechanical
24 disconnecter was added to the P320. The mechanical

02:53:39

25 disconnecter was not added to the P320 to address an

1 out-of-battery issue. There is no out-of-battery issue.
2 The mechanical disconnecter was not added to address a
3 concern that the firearm could fire out-of-battery. The
4 mechanical disconnecter was added as a component to
5 address the drop-fire issue. That's why -- that's why
6 that was added.

7 THE COURT: Okay. All right. I'll look at the
8 *Hartley* case and see what it says. Thank you.

9 MR. MARCHESE: Thank you.

10 THE COURT: Anything else that would be helpful?

11 MR. DWERLKOTTE: A couple of more points on what
12 counsel raised, Your Honor. A lot of those facts that we
13 just heard from counsel are not actually in the pleadings
14 anywhere. This December 2018 event, that's not anywhere
15 in the complaint, Your Honor. The piece about notice and
16 how we're supposed to provide notice and all those things,
17 that is not required by any law that we're aware of.

18 In fact, that would be akin to post-sale duty, which I
19 think is pretty clear under Texas that there is no
20 post-sale duty to warn, recall, retrofit, anything of that
21 nature. So those allegations, I think, are without merit,
22 Your Honor.

23 And then as to the -- this standing piece of this
24 inherent defect, I think they are trying to lump in this
25 case with kind of the false advertising cases on which

1 they primarily rely. And those cases are clear at the
2 point of sale that there is an injury. There is a
3 uniformly false statement that induced a plaintiff to
4 purchase a product.

02:55:05

5 Here the alleged defect may or may not happen. It's
6 contingent on something happening in the future, dropping
7 it numerous times potentially and at certain angles. So
8 that it's -- you can't put this case in the false
9 advertising-type cases, Your Honor.

02:55:18

10 THE COURT: Some of the cases talk about
11 inevitably manifesting.

12 MR. DWERLKOTTE: Absolutely. I think that that
13 is --

02:55:28

14 THE COURT: What is the -- does "inevitably" mean
15 in every weapon, in every product, in every item this will
16 happen or does it mean that in a certain number of cases
17 it's likely to happen?

18 MR. DWERLKOTTE: Are you asking --

02:55:46

19 THE COURT: What does "inevitably manifest" mean
20 in the case law?

21 MR. DWERLKOTTE: Well, I think there has to be a
22 clear allegation that it is inevitable, and it is not
23 here, Your Honor.

02:55:51

24 THE COURT: Does that mean it is going to happen
25 in every single case at some point? What does it mean?

1 MR. DWERLKOTTE: I'm not sure the exact answer to
2 that, Your Honor.

3 MR. JOYCE: But I think it has to happen in
4 ordinary use, Your Honor, here.

02:56:00 5 THE COURT: Well, dropping it is in ordinary use.

6 MR. JOYCE: Is not in ordinary use. Dropping a
7 loaded firearm is --

8 THE COURT: Everybody knows it happens.

9 MR. JOYCE: It can happen.

02:56:08 10 THE COURT: Yes. That's really the point. It
11 can happen during ordinary use. It may not be ordinary.

12 MR. JOYCE: I wouldn't agree it's ordinary use,
13 but it can happen during ordinary use, Your Honor.

14 THE COURT: Right. That's a fair way to put it.
02:56:21 15 All right. Anything else?

16 MR. MARCHESE: No, Your Honor.

17 MR. DWERLKOTTE: No, Your Honor.

18 THE COURT: Well, this has been very helpful, and
19 I appreciate it. We'll try to get an opinion out as
02:56:31 20 quickly as possible. Without prejudging anything, I think
21 that you will have some more work to do to make your
22 pleadings a little bit tighter, and we'll see if that can
23 address some of the issues that have been raised in the
24 motion to dismiss.

02:56:52 25 MR. MARCHESE: Thank you, Judge.

1 MR. ALLEN: Thank you, Your Honor.

2 MR. JOYCE: Thank you, Your Honor.

3 MR. DWERLKOTTE: Thank you, Judge.

4 THE COURT: Thank you.

02:57:00

5 (Proceedings concluded at 2:57 p.m.)

6 *Date: August 27, 2019*

7 ***COURT REPORTER'S CERTIFICATE***

8 *I, Laura Wells, certify that the foregoing is a*
9 *correct transcript from the record of proceedings in the*
10 *above-entitled matter.*

11

12 /s/ Laura Wells

13 *Laura Wells, CRR, RMR*

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